COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-3054-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ADAM HILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Pepin County: ROBERT W. WING, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Adam Hill appeals a judgment convicting him of making a bomb threat, in violation of WIS. STAT. § 947.015.[1] He also appeals an order denying postconviction relief. Hill contends that he is entitled to a new trial because he was convicted on the basis of an in-court identification that was tainted by impermissibly suggestive pretrial identification procedures. He further argues that he was denied the effective assistance of counsel. Hill also claims that he should be given a new trial because the court ignored its own ruling restricting the composition of the jury venire. We reject his arguments and affirm the judgment and order.

BACKGROUND

¶2 On January 18, 1999, at 11:42 p.m., the following message was recorded on Durand High School's voice mail phone message system: "This is a message. I planted a bomb. It is in the building and it is going to go off tomorrow at noon. Don't fuck with me." The next day, classes at the high school were canceled and the building was evacuated. No explosive device was found and no bomb exploded. On January 20, the high school held an assembly and asked any students with information about who could have phoned in the bomb threat to come forward. Three students indicated that they had information. They were asked by the police chief to come to an office next to the principal's to listen to a tape recording of the phone call in order to help identify the caller. All three expressed their belief that the voice on the tape was Hill's, who also attended Durand High School.

[1] WISCONSIN STAT. § 947.015 provides: "Whoever intentionally conveys or causes to be conveyed any threat or false information, knowing such to be false, concerning an attempt or alleged attempt being made or to be made to destroy any property by the means of explosives is guilty of a Class E felony." All references to the Wisconsin Statutes are to the 1997-98 version.

¶3 Before trial, Hill sought a change in venue. Denying the motion, the court stated, "The fact of the matter is I don't know that you will find people in any county that aren't going to have feelings about these kind of cases. ... I think when the clerk calls people in it would be a wise idea to screen that out, try to get people from outside of the Durand School District."

¶4 On the morning of trial, defense counsel questioned the jury pool list that contained several individuals likely from the Durand School District, in light of what the court had said at the motion hearing. The court said that it had not ruled that people from the Durand School District would be automatically excluded, and proceeded with voir dire.

¶5 The defense next addressed the court concerning a motion in limine filed the day before trial. The motion, brought pursuant to WIS. STAT. §§ 901.03(3) and 901.04(3), requested that the three students not be allowed to testify about the identification of Hill's voice. Defense counsel did not previously file a motion to suppress evidence of the students' pretrial identification. The court denied the request to bar this testimony.

¶6 Two of the three students who had identified Hill's voice testified at trial. Tyler Richardson identified Hill as the speaker on the recording. Richardson testified that on three or four occasions during their sixth-hour class together, Hill vowed "to blow up the school," including the "hicks and the whole town of Durand and … everything … in Menomonie too …." In addition, Richardson stated that the recorded message's last statement, "Don't fuck with me," was a phrase that the defendant "always said." He indicated that although he had not spoken to Hill over the telephone, he listened to the tape recording at least two or three times "to be sure" it was Hill's voice.

¶7 Another student, Matthew Bechel, also identified Hill's voice on the tape. Bechel stated that Hill said "he hated the school and the teachers and just the town, and that he was going to do something bad …." Bechel testified that the last statement in the message, "Don't fuck with me," was "a common saying that [Hill] used to say." Bechel also testified that although he had not spoken to Hill over the telephone, he had listened to the tape at least twice to be sure.

¶8 Two additional witnesses testified that Hill had admitted to them separately that he had left the bomb threat message on the Durand High School voice mail. Christopher Brady said that "once or twice a week" at school during the fall semester of 1998-99, Hill vowed to make a bomb threat to the high school. Brady testified that on January 19, 1999, Hill admitted to him that he had called in the threat. The jury heard that Brady had five prior convictions, but also that the State had made no promises in exchange for his testimony.

¶9 Joshua Hensley testified that on January 18, 1999, he picked up Hill from the house where he was staying and drove him to the Treasure Island casino. On the way home, Hensley stated that Hill made a phone call from a pay phone. Hensley said Hill initially refused to identify the purpose of the phone call, but that Hill later said he had called in "a bomb threat" to Durand High School. The jury was aware that Hensley had ten prior convictions, but he stated that the State had made no promises in exchange for his testimony.

¶10 Two sisters, who lived in the house where Hill was temporarily staying, each stated that on January 18, Hensley picked up Hill to go to a casino. One girl, Casadee Hoyer, stated that Hill returned at midnight or soon after. Both girls said that Hill told them to tell the police that Hill was with them at the time of the bomb threat.

¶11 Hill testified on his own behalf and denied making the bomb threat. He stated that he was at basketball practice with the Hoyer sisters and others on the evening of January 18 and went to bed at 11 p.m. He testified that he had gone to the Treasure Island casino with Hensley on December 24, 1998, not on January 18, 1999. He denied Hensley's testimony that Hill placed a call from a pay phone. The jury convicted Hill of the charge, and the court placed him on probation for three years, withholding sentence.

¶12 At the postconviction motion, Hill challenged effectiveness of trial counsel, arguing that the voice identification evidence was erroneously admitted. His trial counsel testified that he believed the procedure under which the students identified Hill's voice was not impermissibly suggestive and for this reason did not file a motion to suppress this identification. The court noted that because Hill testified at trial, jurors themselves had an opportunity to compare Hill's voice to the voice on the audiotape, which was played three times. The court denied the postconviction motion, stating that the procedure by which Hill's voice was identified was not impermissibly suggestive and that counsel's performance was neither deficient nor prejudicial.

ANALYSIS

I. VOICE IDENTIFICATION

¶13 Hill first argues that he was denied the right to a fair trial because he was convicted on the basis of an in-court identification that was tainted by an impermissibly suggestive pretrial identification conducted by the police. He contends that the test for eyewitness identifications set out in ***State v. Wolverton***, 193 Wis. 2d 234, 264-65, 533 N.W.2d 167 (Ct. App. 1995), is the only basis under

which this issue should be analyzed.[2] Hill argues that bringing the students to a room in the high school right next to the principal's office was more suggestive than had the identification occurred at the police station. He further contends that the evidence shows that the three students listened to the tape together, allowing them to improperly influence each other. Finally, he submits that having only one voice on the tape improperly suggested an identity. In short, Hill asserts that, "The procedure used in this case almost guaranteed that irreparable misidentification would occur." We disagree.[3]

¶14 "A criminal defendant is denied due process when identification evidence admitted at trial stems from a pretrial police procedure that is 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" ***Id.*** at 264 (quoting ***Simmons v. United States***, 390 U.S. 377, 384 (1968)). We apply the same rules as the trial court to review its determination whether a pretrial identification should be suppressed. ***State v. Haynes***, 118 Wis. 2d 21, 31 n.5, 345 N.W.2d 892 (Ct. App. 1984). First, we determine whether the pretrial procedure was "so impermissibly suggestive as to

[2] ***State v. Wolverton***, 193 Wis. 2d 234, 265, 533 N.W.2d 167 (Ct. App. 1995) (quoted source omitted), provides that eyewitness identification procedures should be evaluated by considering "[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of [the witness'] prior description of the criminal, [4] the level of certainty demonstrated at the confrontation, and [5] the time between the crime and the confrontation."

[3] We address two of Hill's arguments summarily. First, Hill does not demonstrate what it was about the office in which the identification occurred that in any way tainted the identification. We will not develop Hill's amorphous and unsupported arguments for him. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995). Second, a one-voice "showup" is not on its own impermissibly suggestive. ***Jones v. State***, 59 Wis. 2d 184, 191-92, 207 N.W.2d 890 (1973); *see also* ***Wolverton***, 193 Wis. 2d at 264. Again, Hill does not develop an argument as to why this circumstance, combined with the others, created an impermissibly suggestive identification procedure. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

give rise to a very substantial likelihood of irreparable misidentification." ***State v. Benton***, 2001 WI App 81, ¶5, ___Wis. 2d ___, ___ N.W.2d ___ (quoted source omitted). Initially, the defendant has the burden on this issue. ***Id.*** If a defendant shows that the procedure was impermissibly suggestive, the State must prove that the identification was reliable, considering the totality of the circumstances in order for the identification to be admissible. ***Id.*** The trial court's findings of fact may not be disturbed unless they are "clearly erroneous." WIS. STAT. RULE 805.17(2) (made applicable to criminal proceedings by WIS. STAT. RULE 972.11(1)). Application of facts to constitutional principles is subject to de novo review. *See* ***State v. Eason***, 2000 WI App 73, ¶3, 234 Wis. 2d 396, 610 N.W.2d 208.

¶15 Hill argues that the students were allowed to improperly influence each other by listening to the message together. The police chief testified that the students listened to the tape recording separately, but both students who testified stated that they listened to the tape recording with at least one additional student present. The trial court did not and this court, of course, cannot, resolve this factual dispute.[4] However, even if the trial court would have resolved it in Hill's favor, due process would not require a new trial if the identifications were reliable, considering the totality of the circumstances. *See* ***Benton***, 2001 WI App at ¶5.

¶16 The Seventh Circuit Court has observed:

> Witnesses who listen to a crime that has been "memorialized on tape" are in a position to offer uniquely reliable testimony …. [T]hey have the luxury of listening to the tape in an office, where they can devote their full attention to it ….

[4] *See* ***Rohl v. State***, 96 Wis. 2d 621, 628, 292 N.W.2d 636 (1980).

United States v. Alvarez, 860 F.2d 801, 811 (7th Cir. 1988) (citations omitted). Because the only way to "eyewitness" the crime in this case was to listen to the voice mail message containing the bomb threat, the three students who identified Hill sat in the same position as someone who witnessed the crime. We conclude that their identifications were reliable.

¶17 Richardson and Bechel went to school authorities of their own volition one week after hearing of the bomb threat, because Hill had made suspicious statements to them implicating himself as a possible suspect. Although the students had not heard Hill's voice over a telephone, they testified that they based their identification on prior familiarity with his voice. This is sufficiently reliable as to satisfy authentication or identification requirements under Wisconsin's evidence code. *See* WIS. STAT. § 909.015;[5] *see also* ***State v. Sarinske***, 91 Wis. 2d 14, 45, 280 N.W.2d 725 (1979) (allowing police officer to identify the defendant's voice in a phone call based on the officer's several previous conversations with the defendant).

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[5] WISCONSIN STAT. § 909.015 provides in relevant part:

> By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of s. 909.01.
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> ….
>
> (5) VOICE IDENTIFICATION. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

This provision and FED. R. EVID. 901(b)(5) are identical. Construing this evidentiary rule, the federal courts have concluded that "[a]ny person may identify a speaker's voice if he has heard the voice at any time." ***United States v. Cerone***, 830 F.2d 938, 949 (8th Cir. 1987) (citation omitted). Under this rule, "[a]s long as the basic requirement of familiarity is met, lay opinion testimony is an acceptable means for establishing the speaker's identity." ***United States v. Degaglia***, 913 F.2d 372, 376 (7th Cir. 1990) (citation omitted).

¶18 Moreover, the students had contact with Hill near the time of the identification. Richardson heard Hill say less than two weeks before the bomb threat that he wanted to blow up the school. Bechel heard Hill express a similar sentiment less than two months before the bomb threat. The students testified that the phrase, "Don't fuck with me," in the bomb threat was a phrase Hill frequently used. Richardson and Bechel listened to the tape several times to be certain that the voice was Hill's. We conclude that the students' identification of Hill's voice was reliable and thus was properly admitted into evidence.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

¶19 Hill contends that his trial attorney did not move to suppress the impermissibly suggestive pretrial identification or the witnesses' in-court identification at trial. He argues that his attorney's performance was thus deficient and prejudicial. Because we conclude that the voice identification evidence was properly admitted, we conclude that counsel's performance was not deficient and failure to bring a pretrial motion to exclude the evidence was not prejudicial.

¶20 For ineffective assistance of counsel claims, Wisconsin has adopted the two-pronged standard of ***Strickland v. Washington***, 466 U.S. 668 (1984). ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (holding that the ***Strickland*** analysis applies equally to ineffectiveness claims under the State constitution). A defendant must show both that counsel's performance was deficient and prejudicial to the defense. ***Id.***

¶21 Appellate review of a trial court's conclusion about ineffective assistance claims involves a mixed question of law and fact. ***Id.*** The trial court's assessment of the historical facts will not be set aside unless it is clearly erroneous. *See* WIS. STAT. § 805.17(2); ***Sanchez***, 201 Wis. 2d at 236. Whether the

representation was deficient and prejudicial is a question of law, which we review de novo. ***Id.*** at 236-37.

¶22 We reject Hill's contention that his attorney was deficient for failing to file a motion to suppress the identification. He brought the issue before the trial court in a motion in limine, and received a ruling.

¶23 Even if Hill's attorney should have brought a motion to suppress earlier and had the matter set for a hearing, Hill was not prejudiced for several independently dispositive reasons. Hill's postconviction attorney conceded that all of the evidence necessary for deciding the motion came out at trial. The trial court would have denied the motion to suppress based upon its eventual ruling. The jury heard the tape and Hill's testimony. It therefore had an opportunity to compare the two voices for itself. Further, even if Hill had not testified, he had already agreed to have his voice analyzed. Alternatively, the State could have compelled him to provide a voice sample and, if he refused, it could have made his refusal known to the jury. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 18, 20, 496 N.W.2d 96 (Ct. App. 1992). Most importantly, Hill seriously understates the other evidence of his guilt, which was overwhelming. We reject his claim of ineffective assistance of counsel.

III. JURY VENIRE

¶24 Hill contends that the court ruled at a pretrial hearing that the jury venire should be comprised of people living outside of the local school district, but failed to enforce this ruling on the day of trial. He argues that he is therefore entitled to a new trial.

¶25 Hill's argument fails for two reasons. First, it depends upon the faulty premise that the trial court *ruled* that people outside the Durand school district should be called. Although the court made this remark, it did not grant an order. The court essentially said that depending upon the ability to obtain unbiased jurors through voir dire, it would reconsider the motion to change venue.

¶26 Second, the twelve jurors said they could be fair and impartial and the trial court thus permitted them to hear the case. Hill's speculation that "it's hard to imagine" how the jury could be fair and impartial does not suffice as a legal analysis under the controlling cases. *See* WIS. STAT. RULE 809.19(1)(e); ***State v. Tarantino***, 157 Wis. 2d 199, 217, 458 N.W.2d 582 (Ct. App. 1990) (we do not address speculative arguments). Nor is it sufficient to demonstrate objective juror bias. *See* ***State v. Faucher***, 227 Wis. 2d 700, 718, 596 N.W.2d 770 (1999). Further, Hill does not attempt to show that any juror was biased in the other ways outlined in ***Faucher***, *i.e.*, statutorily or subjectively. We therefore reject his argument.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.